TEGUH INSURANCE CO. SDN. BHD.

v.

INSUNA UNDERWRITING AGENCIES SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 804 of 1984]
25 APRIL 1985

CIVIL PROCEDURE: *Application to set aside O. 14 summary judgment - Agreement to pay debt by monthly instalments - Agreement not to set off credit notes - Default clause stated "the whole of balance owing" whether this allowed set-off a contentious issue which cannot be disposed of summarily - Omission of fifth Director to execute the instruments of guarantee a triable issue - Unconditional leave to defend action.*

The 1st defendants were underwriting agents for the plaintiff insurance company. The 1st defendants owed the plaintiffs RM317,933.47 being premium due and payable by the 1st defendants to the plaintiffs.

On the 17 September 1982, the plaintiffs and the 1st defendants entered into an agreement with the terms, *inter alia*:

(i) The 1st defendants were allowed to settle the debt by monthly instalments;

(ii) In the event of any one instalment not duly paid, the whole of the balance owing would forthwith become due and payable;

(iii) The 1st defendants were obliged to cause all their directors to jointly and severally guarantee the repayment of the agreed instalments;

(iv) The 1st defendants were not allowed to set off any credit note issued by the plaintiffs against payment of the instalments in respect of the debt.

Four of the five directors executed two sets of instruments of guarantee, the first for the repayment of the instalments, and the second for all further payments due and payable by the 1st defendants.

The 1st defendants defaulted in their instalment payments. A writ was issued by the plaintiffs claiming RM129,052.81 after deducting a sum of monies paid out by the 1st defendants on behalf of the plaintiffs and a further sum standing in the credit of the 1st defendants in respect of Motor Insurance policies. Order 14 summary judgment was entered against the 1st, 2nd and 3rd defendants. These defendants appealed against the judgment.

Held:

[1] The 1st defendants' contentions that the plaintiffs had failed to give credit of some further sums and that they were allowed to set off these sums against the plaintiffs' claim were triable issues which cannot be disposed of summarily. Although cl. 3(ii) of the contract did not allow set-offs of instalment payments by the 1st defendants, cl. 4 (the default clause spoke of the "whole of the balance outstanding" which indicated that credit amount in favour of the 1st defendants could be taken into account. Further, the plaintiffs seemed to have appreciated this by setting off against the balance due on instalments in para. 10 and 11 of their statement of claim.

[2] There was a further triable issue in the omission of the fifth director to execute the instruments of guarantee.

[Unconditional leave given to 1st, 2nd and 3rd defendants to defend action.]

For the plaintiffs - N. Chandran with Teh Lip Kuan; M/s. Adnan Sundra & Low
For the 1st and 2nd defendants - S.S. Gill; M/s. S.S. Gill & Co.
For the 3rd defendant - Yeo Yang Poh; M/s. Lim & Hooi

JUDGMENT

VC George J:

As at 31 July 1982 the first defendants in respect of their business of underwriting agents owed the plaintiff insurance company the sum of RM317,933.47 being premium due and payable by the first defendants to the plaintiffs. On 17 September 1982 the plaintiffs and the first defendants entered into an agreement under the terms of which *inter alia* the first defendants were allowed to settle the said debt by certain agreed monthly instalments with the usual default clause that in the event any one instalment was not duly paid the whole of the balance owing would forthwith thereafter become due and payable. By the agreement the first defendants were also obliged to cause all their directors to jointly and severally guarantee the repayment of the agreed instalments.

Apart from coming to terms for the repayment of the old debt, the parties by the same agreement also provided terms and conditions for their future relationship. *Inter alia* this provided for the plaintiffs to assume control over sub-agents appointed by the first defendants and for the payment by the plaintiffs to the first defendants of certain "marketing allowances" which by cl. 8 of the agreement was to be paid on a case by case basis after the whole of the premium payable in respect of each case had been received by the plaintiffs in full. By cl. 3(ii) of the agreement the first defendants were not allowed to set off any credit note issued by the plaintiffs against payment of the aforesaid instalments in respect of the old debt.

The requisite instrument of guarantee as well as a further instrument of guarantee that were provided to the plaintiffs by the first defendants were each executed by only four of the five then existing directors, one for the payment of the instalments as aforesaid and the other for the payment of instalments as well as "all further payments which become due and payable by the first defendants to the plaintiffs".

The first defendants fell into arrear in respect of the instalment payments. By their letter of 6 October 1983 to the first defendants and to the four guarantors, the plaintiffs' solicitors stated that the amount then due and owing by the first defendants to the plaintiffs was RM210,103.50 and payment of that amount was demanded. On 23 March 1984 the instant writ was caused to be issued by the plaintiffs against the first defendants and against the four directors who had executed the two instruments of guarantee. The amount claimed by the writ was RM129,052.81, interest and costs, the plaintiffs having given credit to the first defendants of a sum of RM61,744.84 "representing the sum of monies paid out by the 1st defendants to various claimants for and on behalf of the Plaintiffs..." and in respect of a further amount of RM19,305.85 said to be "the amount credited in favour of the 1st defendants in respect of motor insurance policies...".

The plaintiffs took out O. 14 proceedings against the defendants. This was resisted by the first, second and third defendants but the learned Senior Assistant Registrar was prevailed upon to grant leave to the plaintiffs to enter final judgment against each of the first, second and third defendants for the amount claimed, interest and costs. The first, second and third defendants appealed against the said orders of the Senior Assistant Registrar.

For the first defendants it was contended that the plaintiffs had failed to give credit to the first defendants of a further sum of RM24,594.08 being, it was contended, claims paid out by the first defendants for and on behalf of the plaintiffs. In the proposed statement of defence the first defendants condescended into some particulars of the said purported payments. The first defendants also contended that the plaintiffs had not given credit to the first defendants of the marketing allowances which under the said agreement should have been paid to the first defendants, the aggregate of which they claim amounted to RM71,650.12. In respect of this claim as well the first defendants have given certain particulars in the proposed statement of defence. It was further contended that the first defendants are entitled to set off a further unascertained amount to be ascertained on discovery being marketing allowances for the periods "October and November 1982 and February 1984 onwards in respect of sub-agents' production for motor and for the months of October and November 1982 and March 1984 onwards in respect of sub-agents' production for non-motor".

There has been no denial of these contentions that those further amounts are due to the first defendants. The stand taken for the plaintiffs was that those contentions are not relevant in that by cl. 3(ii) [to which reference has been made here above] the defendants were not allowed to set off the said amounts. The subclause reads as follows:

> 3 (iii) Insuna shall not use any form of Credit Note issued by Teguh to them as part payment towards any instalment payable on due date the amount of instalments payable shall not be reduced under any circumstances.

It is clear that credit notes whether in respect of payments out made by the first defendants on behalf of the plaintiffs or in respect of marketing allowances due to them or issued for any other reason could not be used towards the payment of the agreed monthly instalments. Under the terms of the agreement those instalments have to be paid in cash as and when they fell due.

However, by the default clause which is cl. 4 of the agreement (which clause was eventually invoked by the plaintiffs), in default of payment of any one instalment, "the whole of the balance owing shall forthwith thereafter become due and payable". It can be and was argued that to ascertain the balance owing, amounts credited in favour of the first defendants or which ought to be credited should be taken into account. Clause 3(ii) it is contended does not preclude this. The plaintiffs themselves appear to have appreciated this and had set off against the balance due on the instalments in para. 10 of the statement of claim an amount of RM61,744.84 said to be payments out made by the first defendants and in para. 11 another amount of RM19,305.85 in respect of which it would appear the plaintiffs had issued credit notes in favour of the first defendants. Clause 8 of the agreement as has been seen herein above provides that the agreed marketing allowances shall be paid in respect of each case after the whole of the premium payable in respect of such case had been received by the plaintiffs. To ascertain the amount of marketing allowances that was due and payable (if the amount claimed on behalf of the first defendants is disputed) calls for the taking of an account to ascertain in which of the cases the whole of the premium had been paid.

These contentions that the first defendants are entitled to set off substantial amounts against the amount claimed appear to have merit and certainly cannot be disposed of summarily.

As for the guarantors, apart from being able to rely on the uncertainty of the amount due and payable by the first defendants they have the additional defence, that is to say that the guarantee is not enforceable against them because of the omission of the fifth Director to

execute the instruments of guarantee. Whether the guarantors are entitled to rely on this is a triable issue which may call for evidence *inter alia* of the circumstances which led to the provision of the said instruments. It is also not a matter which can be disposed of summarily.

The appeals [encl. (34) and (37)] are allowed with costs. The orders made by the Senior Assistant Registrar on 7 February 1985 on the O. 14 application, as against the first, second and third defendants, are set aside. The first, second and third defendants are given unconditional leave to defend the action.

Also found at [1986] 2 CLJ 68